# United States Court of Appeals for the Second Circuit



# APPELLANT'S BRIEF & APPENDIX

73-1808 73-1808

IN THE

# United States Court of Appeals FOR THE SECOND CIRCUIT

Docket No. 73-1808

JOHN J. GALGAY, as Trustee in the Reorganization of R. Hoe & Co., Inc.,

Plaintiff-Appellant.

V

BULLETIN COMPANY, INC.,

Defendant-Appellee.

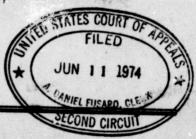
ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK.

#### BRIEF AND APPENDIX OF APPELLANT JOHN J. GALGAY, AS TRUSTEE

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Dated: June 11, 1974



PAGINATION AS IN ORIGINAL COPY

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#### IN THE

### United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 73-1808

John J. Galgay, as Trustee in the Reorganization of R. Hoe & Co., Inc.,

Plaintiff-Appellant.

v.

Bulletin Company, Inc.,

Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK.

#### BRIEF AND APPENDIX OF APPELLANT JOHN J. GALGAY, AS TRUSTEE

#### **Preliminary Statement**

This is an appeal by plaintiff from a judgment of the United States District Court for the Southern District of New York entered on March 1, 1974 granting defendant's motion to dismiss the complaint on the ground that the Court lacks in personam jurisdiction over the defendant. (52a) This brief is addressed to the District Court's March 1, 1974 judgment and memorandum opinion of the February 26, 1974 in support thereof. (48a-51a) John J. Galgay, as Trustee, in the Reorganization of R. Hoe & Co., Inc. v. Bulletin Company, Inc. (S.D.N.Y.) (Pierce, J. Plaintiff filed its Notice of Appeal on March 26, 1974.

#### Issue Presented for Review

Whether the District Court erred in granting defendant's motion to dismiss the complaint for lack of in personam jurisdiction pursuant to New York CPLR § 302(a) (1) "transact any business" standard where, final execution of the contract took place in New York, the contract provided that New York law was to govern its enforcement, the goods sold under the contract were manufactured in New York and delivered f.o.b. New York, and the contract provided for the defendant to make payment in New York.

#### Statement of the Case

#### **Proceedings Below**

The present action was commenced by plaintiff-appellant against defendant on April 24, 1973. (3a) Service of process was made by the United States Marshal upon the defendant at its offices in Philadelphia, Pennsylvania based upon New York CPLR § 302(a)(1) as applied through Rule 4(e) Federal Rules of Civil Procedure. (3a) On June 12. 1973 the defendant moved pursuant to Rule 12(b) (2) of the Federal Rules of Civil Procedure to dismiss the complaint on the ground that the District Court did not have in personam jurisdiction over the defendant. (7a) After submission of memoranda and affidavits by plaintiff and defendant in support of their respective positions, the District Court, on March 1, 1974, entered an order and judgment granting defendant's motion dismissing the complaint, with a finding that it lacked in personam jurisdiction over defendant. (48a-52a)

#### Statement of Facts

The present action arises out of a contract of sale entered into on February 2, 1967 between R. Hoe & Co., Inc. ("Hoe") and defendant under which Hoe agreed to sell

certain machinery to defendant for the sum of \$1,177,420 (the "Agreement"). (5a) after subsequent adjustments and supplying additional components, the overall balance due was \$1,178,459.10. Defendant has paid \$1,155,813.00 leaving \$22,566.10 still owing after allowing the defendant a credit of \$80. (6a)

Negotiations prior to the signing of the Agreement were begun in Philadelphia, Pennsylvania and continued through telephone conversations and written correspondence between representatives of Hoe and the defendant. (48a) Final execution and acceptance of the contract by Hoe took place in New York. (50a)

The main obligations of the Agreement, the manufacture in New York of custom machinery to be delivered f.o.b. New York, were to be performed in New York. (48a) Furthermore, paragraph 19 of the Agreement recites that "this contract is to be governed and interpreted by the laws of the State of New York." (49a)

Such payments that defendant made were mailed to Hoe in New York. (49a) Thus, the defendant's failure to make payment and consequent breach also took place in New York. The machinery was delivered in New York to D. F. Bast, Inc., a trucking company employed by George R. Hall of Cleveland, Ohio, which was acting on behalf of defendant with respect to receipt, shipment and assembly of the machinery. (17a, 49a)

It is clear therefore, that the transaction which is the subject matter of this action took place in New York. Furthermore, the facts conclusively illustrate that defendant, through persons acting in its behaif, came into New York in furtherance of the transaction, and in so doing relied upon the benefit and protection of New York law. This reliance is further demonstrated by the contract provision which recites that New York law is to govern the transaction. Hence the defendant has transacted business in New York within the purview of CPLR §302(a)(1).

# ARGUMENT

#### POINT I

Application of §302(a)(1) in present case is in conformance with Supreme Court decisions and Legislative history

Defendant's contacts with New York were more than sufficient to confer upon the district court in personam jurisdiction under New York CPLR §302(a)(1), as applied through Rule 4(e), Federal Rules of Civil Procedure.

CPLR §302(a) provides as follows:

"Acts which are the basis of jurisdiction. As to a cause of action arising from any of the acts enumerated in this section, a court may exercise personal jurisdiction over any non-domiciliary, or his executor or administrator, who in person or through an agent:

(1) transacts any business within the State;

Although the determination of what constitutes the "transaction of business" in New York under CPLR \$302(a)(1) must be made on a case by case basis, depending on the facts of each case, there are certain very clear indicia to which a court may look in making such a determination.

The standards for measuring minimum activities satisfying constitutional objections to subjecting a foreign corporation to personal jurisdiction have been enunciated in several United States Supreme Court cases.

A nonresident defendant should have "certain minimum contact" with the forum so that maintenance of the action does not offend "traditional" notions of fair play and substantial justice. International Shoe Co. v. Washington

Office of Unemployment Compensation and Placement, 326 U.S. 310 (1945). Moreover in an action involving a contract, the contract should have a substantial connection with the forum state. McGee v. International Insurance Co., 355 U.S. 220, 223 (1957). Finally, "it is essential in each case that there be some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum state, thus invoking the benefits and protections of its laws." Hanson v. Denkla, 357 U.S. 235, 253 (1958).

Section 302(a)(1) is to be interpreted in light of the liberal construction encompassed within the "new enclave" concept of "transaction of any business within this state" as opposed to the more confined interpretations applied in other jurisdictions. This point was succinctly stated in Longines-Wittnauer Watch Co. v. Barnes & Reinecke, Inc., 15 N.Y.2d 443, 456-457, 261 N.Y.S.2d 8, 21 (1965), cert. denied, 382 U.S. 905 (1966), by Judge Fuld:

"In enacting section 302, the Legislature chose not to fix precise guidelines, as other states have done, so as to draw within the jurisdictional reach of the New York courts only contracts 'made within this State' (Md. Ann. Code, art. 23, § 92, subd. [d]) or contracts 'made in this State or to be performed in this State' (N. C. Gen. Stat., § 55-145, subd. [a], par. [1]) or contracts 'to be performed in whole or in part by either party in [this State]' (Minn. Stat. Ann., § 303.13, subd. 1, par. [3]; Tex. Rev. Civ. Stat. Ann. [Vernon], art. 2031b, § 4; Vt. Stat. Ann., tit. 12, § 855). The Advisory Committee which drafted the section took cognizance of such statutes in its report (N.Y. Advisory Comm. Rep. [N.Y. Legis. Doc., 1958, No. 13], pp. 39-40) and decided, instead, to follow the broad, inclusive language of the Illinois provision, adopting as the criterion the 'transact [ion of] any business within the state'. The design of the legislation, as expressed by the committee, was to take advantage of the 'new [jurisdictional]

enclave' (Bomze v. Nardis Sportswear, 165 F.2d 33, 36, per L. HAND, J.) opened up by International Shoe where the nonresident defendant has engaged in some purposeful activity in this State in connection with the matter in suit. (See N.Y. Advisory Comm. Rep. [N.Y. Legis. Doc., 1958, No. 13], pp. 39-40; see, also, 1 Weinstein-Korn-Miller, N.Y. Civ. Prac., par. 302.06.)"

Analyzing the facts and circumstances in the present case against the backdrop of the above authorities compels the conclusion that the defendant is subject to the jurisdiction of New York courts. Defendant entered into an agreement in New York which had substantial connection with this forum. The defendant expressly invoked the benefits and protections of New York laws by executing the agreement, which specifically provided for New York law to govern its enforcement. Had Hoe failed in its performance under the Agreement, the defendant would have had the right to rely upon this very same provision for relief. The provision therefore, expressly permits the defendant to rely on the benefit and protection of the law of this State. Rosen v. Solomon, 42 U.S. L.W. 2572 (E.D. Pa. 4/18/72). The defendant also relied upon the benefit and protection of New York law in taking possession of the machinery in New York.

<sup>\*</sup>In National Rental v. Szukhent, 375 U.S. 311, 315-316 (1964), the Supreme Court held that a provision similar to that under discussion was to assure that any litigation under the contract should be conducted in New York.

#### POINT II

Bast's actions in New York are a sufficient nexus for jurisdiction

It is generally accepted that § 302(a)(1) "transact business" standard requires fewer contacts than those required by the "doing business" test. Longines-Wittnauer Watch Co. v. Barnes & Reinecke, Inc., supra, 15 N.Y.2d 443; Liquid Carriers Corp. v. Mmerican Marine Corp., 375 F.2d 951 (2d Cir. 1967); Potter's Photographic Application Co., 292 F.Supp. 92 (E.D.N.Y. 1968); 1 Weinstein-Korn-Miller, New York Civil Practice, § 302.06; McLaughlin, Practice Commentary to CPLR § 302, McKinney's Consol. Laws of N.Y., Book 7B at 431. The "transact business" test merely requires the cause of action to be founded upon business transacted within New York.

In Parke-Bernet Galleries, Inc. v. Franklyn, 26 N.Y.2d 13, 308 N.Y.S.2d 337, 340 (1970), the New York Court of Appeals in addressing itself to the issue of whether a non-resident defendant's presence in New York was required to confer in personam jurisdiction, stated:

"It is important to emphasize that one need not be physically present in order to be subject to the jurisdiction of our courts under CPLR 302 for, particularly in this day of instant communications one can engage an extensive purposeful activity here without ever setting foot in the state."

Defendant is not alleged to have been physically present in New York for purposes of the operative transaction. However, performance of the Agreement took place in New York and persons acting on defendant's behalf actually entered New York in furtherance of the operative transaction. (17a, 18a) The importance of entry into New York by a nonresident's agent is aptly demonstrated in the definition of "transact business" found in *Millner Co., Inc.* v. *Noudar, LDA.,* 24 A.D.2d 326 (1st Dept. 1966):

"'In the broadest sense, a piece of business is transacted within this state when an individual or corporation is within or enters this state in person or by agent and, through dealing herein with another, effectuates or attempts to effectuate herein a purpose directly related to his economic affairs or, if a corporation, to its corporate ends." Id., at 331.

See Also to the same effect Legros v. Irving, 354 N.Y.S. 2d 47 (Sup. Ct. N.Y. County 1973).

D. F. Bast, Inc., acting as a subcontractor for George R. Hall, defendant's agent took possession of the machinery in New York. (17a, 18a) Defendant has not denied that Hall and Bast were acting on its behalf and that Bast's presence in New York was for the specific purpose of securing possession of the press equipment. In Legros v. Irving, 354 N.Y.S.2d, supra, at p. 50, a libel action based upon a book written by defendant Clifford Irving in which jurisdiction was sustained over a foreign co-defendant, the Court stated:

"The Court of Appeals has noted that 'realities' rather than formal agency requirements are the test when a third-party seeks to base jurisdiction over the non-resident defendant on the acts of his purported agent [Parke-Bernet Galleries v. Franklyn, 26 N.Y.2d 13, 19, 19n (1970)]."

Thus, although defendant itself was not present in New York, the fact that D. F. Bast, Inc., regardless of characterization, came into New York in furtherance of defendant's business purposes provides sufficient nexus between this forum and the defendant to invoke this Court's jurisdiction over this action.

#### POINT III

#### Point of delivery is factor to be considered

Another important factor in consideration of the issue presented here is the significance of the shipment point of the machinery sold under the contract. M. Katz & Son Billiard Products, Inc. v. G. Correale & Sons, Inc., 270 N.Y.S.2d 672 (1st Dept. 1966), aff'd, 285 N.Y.S.2d 871 (1967), is cited by the district court as presenting a situation similar to that found in the present case, noting that the New York Supreme Court unanimously held that shipment of goods by common carrier to New Jersey, f.o.b. plaintiff's factory in New York City, was not sufficient to sustain jurisdiction. (50a) The lower court also notes that the plaintiff in the present case chose the f.o.b. point; and therefore concludes that shipment designation f.o.b. New York should be of little consequence. (51a)

As to this last point it should be noted that the contract provided for shipment, f.o.b. New York (25a) and required the defendant's affirmative assent, thus making it a bilateral decision and not one dictated by Hoe. Moreover, the Katz case and others cited in the opinion, discuss only a single aspect of the contacts alleged by the plaintiff herein. Thus, while the court in Katz did not sustain jurisdiction over a nonresident defendant, there are several elements present in the case at bar which were absent in the Katz case; namely, there was no written contract in Katz, and the order was placed entirely by telephone, hence, there was no execution of a contract in New York. Furthermore, in Katz there was no express provision that New York law should govern the transaction and of great importance is the fact that there was no indication in Katz that performance consisted of anything more than the act of shipping the products. In the present case performance, including custom construction of the product in New York, at a

cost well in excess of \$1,000,000 and shipment of the finished product from New York pursuant to a contract which was understood by both parties to be centered in New York was far more than in *Katz*.

Agrashell, Inc. v. Bernard Sirotta Co., 344 F.2d 583 (2d Cir. 1965), is also cited by the Court below. While most of the contacts involved in the present case were also present in the Agrashell case, there was no clear resolution in Agrashell of the question of whether performance was to be in New York. In Agrashell, this Court stated, that if as alleged by plaintiff, the sale was f.o.b. New York, the defendant would have been transacting business in New York, since the risk of loss would have been on defendant in New York and defendant would therefore have been enjoying the protection of New York law. Thus under circumstances similar to the present fact pattern, this Court held that determination of the shipment point would decide the issue of jurisdiction, utilizing a test of who was responsible for the goods and trucks while they were travelling through New York. Judge Waterman, speaking for the Court stated:

"... we feel that in cases arising out of contractual relationships, the rules, governing amenability to suit should be reasonably clear-cut, so that the parties may predict with some certainty the jurisdictional consequences of their conduct. If these rules can be based on a body of law already well established and well understood, so much the better. The law relating to passage of risk in the sale and carriage of goods meets this need, and at the same time it is directly related to the policies governing personal jurisdiction over foreign corporations." 344 F.2d. at 589 (Citation Omitted)

#### POINT IV

Totality of contacts is the proper standard by which to determine whether defendant transacted business in New York.

In support of its decision, the Court below states that neither execution of the contract in New York nor shipment of the machinery f.o.b. New York is sufficient to constitute purposeful activity in New York by defendant. (50a, 51a) The remainder of the Court's opinion discusses the determinative value of each of these factors and concludes that neither is sufficient to confer jurisdiction. (51a) While isolated considerations of each of these factors may justify the lower court's decision, the weight of authority suggests that this method of analysis is improper in deciding whether a nonresident defendant is amendable to in personam jurisdiction. In Longines-Wittnauer Watch Co. v. Barnes & Reinecke, Inc., supra, 15 N.Y.2d 443, 457, the New York Court of Appeals expressed the prevailing view:

"We need not determine whether any one of these activities would, in and of itself, suffice to meet the statutory standard; in combination they more than meet that standard." (Emphasis added)

The language of this decision clearly indicates that a court should first determine whether the combined factors support jurisdiction. Moreover, even assuming that the lower court was correct in its determination that the individual factors do not support jurisdiction, this Court should evaluate the totality of these contacts before determining the issue of jurisdiction. Watherston, Inc. v. Forman, 70 Misc.2d 539, 334 N.Y.S.2d 35 (Civ. Ct., N.Y. City 1972), aff'd, 73 Misc.2d 875, 342 N.Y.S.2d 744 (Sup. Ct., App. T. 1st Dept. 1973). The significance of this method of analysis

received further note in Longines, supra, 15 N.Y.2d at p. 457 (footnote 5):

"While by no means controlling, it is worthy of some note that the decisions interpreting the Illinois statute—on which, as we have noted, section 302 is modeled—have held that the place of contracting is not the exclusive criterion, and that the requisite transaction of business by the nonresident defendant within the forum may consist of such activity on his part as engaging in preliminary negotations for the contract or in subsequent acts in furtherance thereof, the issue turning, in essence, on the totality of the defendant's activities within the forum." (Citations omitted)

The factors referred to in Longines, id., are no more compelling than those in the present case. Final execution of the contract is presumed to have taken place in New York (51a); the contract recites that New York law is to govern (50a) and that delivery of the machinery manufactured under the contract was to take place f.o.b. New York; [49a] the contract involved a sum in excess of one million dollars (\$1,000,000); (23a) substantial performance of the contract took place in New York; and persons acting on behalf of defendant took possession of the machinery in New York. (17a, 18a) The sheer weight of these factors combined dictate but one conclusion: the defendant engaged in a "purposeful activity" in New York and thereby transacted business in this State making it amenable to the jurisdiction of the District Court.

#### Conclusion

For the foregoing reasons the decision of the lower court should be reversed.

Respectfully submitted,

WINTHROP, STIMSON, PUTMAN & ROBERTS

By

A. Edward Grashof A Member of the Firm

Attorneys for Plaintiff-Appellant John J. Galgay, As Trustee

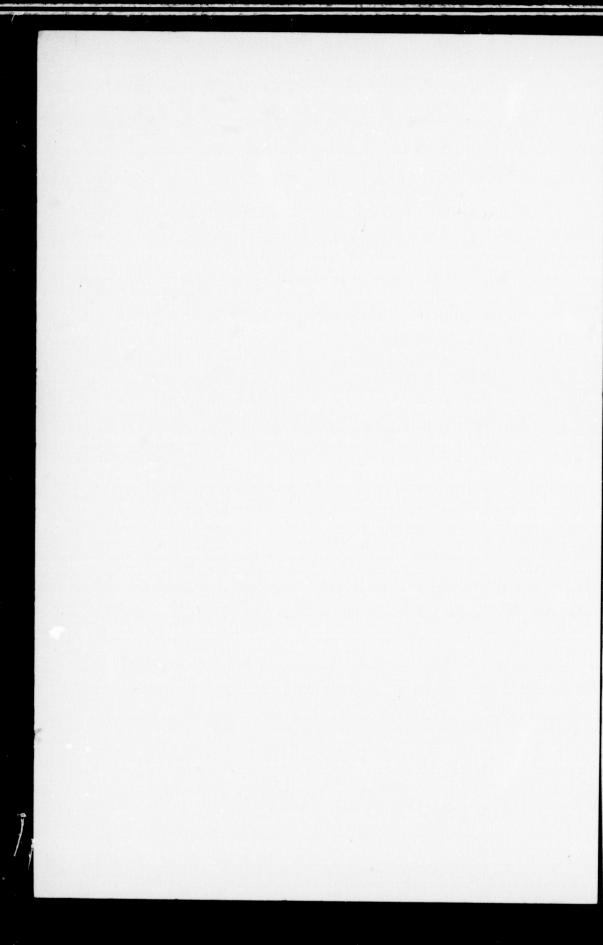
GARY G. COOPER of Counsel

Dated: June 11, 1974

# **APPENDIX**

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#### IN THE

## United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 73-1808

JOHN J. GALGAY, as Trustee in the Reorganization of R. Hoe & Co., Inc.,

Plaintiff-Appellant,

v.

BULLETIN COMPANY, INC.,

Defendant-Appellee.

#### **Docket Numbers**

Date	Proceedings
April 23, 1973	Complaint filed and summons issued.
May 17, 1973	Filed Summons and marshals ret. Served: Bulletin Co., Inc. on 5/9/73.
June 1, 1973	Filed Stip & Order that the time for dft. to answer to complaint is extended to 6/12/73. Pierce J.
June 12, 1973	Filed Dft. Bulletin Co., Inc. Notice of Motion. Re Dismiss complaint. ret. 6/22/73.
June 12, 1973	Filed Dft. Memorandum of Law in support of Motion to Dismiss.
June 21, 1973	Filed Stip & Order that pltffs. time to answer dfts. motion is extended to 7/23/73. Pierce J.

#### Docket Numbers

Date	Proceedings
July 23, 1973	Filed Affidavit by Henry E. Bellino in opposition to motion to dismiss.
July 23, 1973	Filed Pltffs. Memorandum of Law in opposition to motion to dismiss.
July 30, 1973	Filed Supplemental memorandum in support of dft. Bulletin Company's motion to dismiss.
October 2, 1973	Filed Memo. End. on pltffs. affidavit dated 7/23/73. The Pltff. is requested to furnish an affidavit upon knowledge to support its contention that completion of the execution of the contract herein took place in N. Y.
December 4, 1973	Filed Affidavit by Raymond R. Dittrich
December 21, 1973	Filed Supplemental Affdvt. of Albert Spendlove.
December 21, 1973	Filed Defts Supplemental memorandum of law in support of its motion to dismiss.
January 15, 1974	Filed Memorandum of law in opposi- tion to defts. supplemental memo- randum in support of its motion to dismiss.
February 26, 1974	Filed Opinion #40397. The defts. motion to dismiss the complaint for lack of in personam jurisdiction is hereby granted. Pierce J. (mailed notice)
March 1, 1974	Filed Judgment Ordered that the defts. have judgment against the pltff. dismissing the complaint. Clerk. Ent. 3/1/74. (mailed notice)

#### Summons

#### UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

To the above named Defendant:

You are hereby summoned and required to serve upon Winthrop, Stimson, Putnam & Roberts, plaintiff's attorneys, whose address is 40 Wall Street, New York, New York 10005 an answer to the complaint which is herewith served upon you, within 20 days after service of this summons upon you, exclusive of the day of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the complaint.

Thomas E. Andrews,

Clerk of Court.

E. G. Becker

Deputy Clerk.

[SEAL OF COURT]

Date: April 24, 1973

#### Complaint

#### UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF NEW YORK

#### [SAME TITLE]

Plaintiff by his attorneys, Winthrop, Stimson, Putnam & Roberts, complaining of the defendant herein alleges:

#### FOR A CAUSE OF ACTION

- 1. Plaintiff is Trustee in Reorganization of R. Hoe & Co., Inc., the Debtor in proceedings pending in the United States District Court for the Southern District of New York under Chapter X of the Bankruptcy Act. R. Hoe & Co., Inc. is a corporation organized and existing under the laws of the State of New York, having its principal office in the Borough and County of the Bronx, City and State of New York.
- 2. Upon information and belief, Bulletin Company, Inc. is a corporation organized and existing under the laws of the State of Pennsylvania with its principal office at 440 Domino Lane, Philadelphia, Pennsylvania, and at all times mentioned herein transacted business in the State of New York.
- 3. Jurisdiction in this matter is based upon 28 U.S.C. 1332. The amount in controversy is in excess of \$10,000 exclusive of interest and costs.
- 4. Heretofore and on or about the 2nd day of February, 1967, at New York City, New York, R. Hoe & Co., Inc. sold to the defendant pursuant to a certain contract in writing (hereinafter the "Agreement") certain goods, wares and merchandise consisting of machinery more fully described

#### Complaint

therein and the defendant promised and agreed to pay plaintiff for such goods, wares and merchandise the sum of One Million One Hundred Seventy-eight Thousand Three Hundred Dollars (\$1,178,300) of which 5% was to be paid on or before execution of said agreement, 10% to be paid in 10 successive equal monthly installments beginning on February 1, 1967, and the balance to be paid when the equipment was installed and ready for commercial operation.

- 5. Defendant also requested R. Hoe & Co., Inc., to supply certain additional electrical components for use with the above-mentioned machinery and agreed to pay Hoe therefor the sum of One Thousand Five Hundred Ninety-one Dollars (\$1,591) of which the defendant paid Hoe the sum of One Thousand Four Hundred Thirty-one Dollars and Ninety Cents (\$1,431.90) leaving a balance of One Hundred Fifty-nine Dollars and Ten Cents (\$159.10) which was to be added to the balance remaining unpaid on the aforesaid contract.
- 6. Upon information and belief, all of said machinery was installed and ready for commercial operation in or about December, 1969, and the balance of said purchase price then became due and payable.
- 7. The total agreed purchase price of the machinery described in paragraph 4 of this complaint and the additional electrical components described in paragraph 5 of this complaint was One Million One Hundred Seventy-eight Thousand Four Hundred Fifty-nine Dollars and Ten Cents (\$1,178,459.10), no part of which has been paid by defendant except the sum of One Million One Hundred Fifty-five Thousand Eight Hundred Thirteen Dollars (\$1,155,813.00). After crediting the defendant with the sum of Eighty

#### Complaint

Dollars (\$80.00) by allowance of certain credits against the agreed purchase price, there is a balance due plaintiff of Twenty-two Thousand Five Hundred Sixty-six Dollars and Ten Cents (\$22,566.10) which the defendant has failed and refused to pay although payment thereof has been duly demanded.

- 8. Plaintiff has duly performed all the terms and conditions of said contract on its part to be performed.
- 9. By reason of the foregoing plaintiff has been damaged in the amount of Twenty-two Thousand Five Hundred Sixty-six Dollars and Ten Cents (\$22,566.10).

Wherefore, plaintiff demands judgment against the defendant in the amount of Twenty-two Thousand Five Hundred Sixty-six Dollars and Ten Cents (\$22,566.10) with interest thereon from the 1st day of December, 1969.

Respectfully submitted, Winthrop, Stimson, Putnam & Roberts

By A. Edward Grashof
A Member of the Firm
Attorneys for Plaintiff
40 Wall Street
New York, New York 10005
Tel. No. (212) WH 3-0700

#### Notice of Motion and Motion to Dismiss by Defendant Bulletin Company, Inc.

# UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

SIRS:

PLEASE TAKE NOTICE, that upon the Complaint in this action and the annexed Affidavits of Albert Spendlove, Richard Powers and Richard W. Carpenter, defendant Bulletin Company, Inc., by its attorneys, will move this Court before the Honorable Lawrence W. Pierce, in Room 604 in the United States Courthouse, Foley Square, New York, New York, on June 22, 1973 or as soon thereafter as counsel can be heard for an Order pursuant to Rule 12(b)(2) dismissing the Complaint for lack of jurisdiction over defendant Bulletin Company, Inc., and granting such further relief as may seem just.

Dated: New York, N. Y. June 12, 1973

BLEAKLEY, PLATT, SCHMIDT & FRITZ

By Frank Fritz A Member

> Attorneys for Defendant Bulletin Company, Inc. 120 Broadway New York City, N. Y.

To: A. Edward Grashof, Esquire Winthrop, Stimson, Putnam & Roberts 40 Wall Street New York, New York

#### Affidavit of Albert Spendlove

#### UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

Commonwealth of Pennsylvania County of Philadelphia ss:

Albert Spendlove, being duly sworn, deposes and says:

- 1. I am Vice-President and Business Manager of Bulletin Company, Inc. (hereafter "Bulletin"), defendant herein.
- 2. I participated in the negotiations with representatives of R. Hoe & Company (hereafter "Hoe") for the purchase of certain machinery pursuant to a contract between Hoe and Bulletin, which contract is referred to in plaintiff's Complaint and gives rise to plaintiff's cause of action.
- 3. Mr. Richard Powers, Production Manager of Bulletin also participated in the negotiations with Hoe representatives concerning the contract referred to in plaintiff's Complaint.
- 4. All negotiations, discussions, proposals, counter proposals and all other actions by myself and Mr. Powers leading up to the execution of the contract referred to in plaintiff's Complaint occurred either (a) by telephone calls or correspondence to and from Philadelphia between Hoe representatives and myself or Mr. Powers or (b) by meetings at the offices of the Bulletin in Philadelphia, Pennsylvania.
- 5. With respect to the meetings referred to in paragraph 4, above, I participated personally in at least three such meetings and perhaps as many as five. All these meet-

#### Affidavit of Albert Spendlove

ings occurred in Philadelphia, Pennsylvania and were attended by Raymond Dittrich, a Hoe representative. At at least two of these meetings Mr. Dittrich submitted to me two formal written proposals. I signed one of these proposals on December 15, 1966 in Philadelphia, Pennsylvania.

- 6. I also signed in Philadelphia, Pennsylvania, on or about February 2, 1967, the contract referred to in plaintiff's Complaint and my signature was witnessed in Philadelphia, Pennsylvania by my then secretary Ms. R. M. Garvey.
- 7. The contract referred to in plaintiff's Complaint was also signed on or about February 2, 1967 in Philadelphia, Pennsylvania by Robert L. Taylor, President of Bulletin and witnessed in Philadelphia, Pennsylvania by Mr. Taylor's secretary, Ms. Marjorie H. Woodruff.
- 8. The machinery purchased by Bulletin from Hoe was delivered to Philadelphia, f.o.b. at Hoe's New York factory, by an independent contractor and rigger George R. Hall of Cleveland, Ohio.
- 9. The machinery was shipped in segments and had to be assembled at the Bulletin's offices in Philadelphia, Pennsylvania.
- 10. Said segments were assembled at the Bulletin's offices in Philadelphia, Pennsylvania under the supervision of a Hoe representative who came to Philadelphia for this purpose and who actually resided in Philadelphia until the assembly was completed.
- 11. After the machinery was assembled, it failed on numerous occasions to operate satisfactorily and I or Mr. Powers telephoned Hoe representatives from Philadelphia on numerous occasions to report this fact.

#### Affidavit of Albert Spendlove

- 12. On at least a dozen occasions, Hoe representatives visited Bulletin's offices in Philadelphia, Pennsylvania to attempt to rectify the operational difficulties of the machinery, which attempt has to date proven unsuccessful.
- 13. Substantial partial payment for the machinery purchased under the contract referred to in plaintiff's Complaint has been made by Bulletin by remittances sent from Philadelphia.
- 14. At no time did I, Mr. Powers or any other Bulletin employee visit Hoe in New York or otherwise travel to New York in connection with the contract referred to in plaintiff's Complaint.

ALBERT SPENDLOVE

[Verified on June 7, 1933 by Agnes C. Sullivan]

#### Affidavit of Richard Powers

#### UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

Commonwealth of Pennsylvania (ss.:

RICHARD Powers, being duly sworn, deposes and says:

- 1. I am Production Manager of Bulletin Company, Inc. (hereafter "Bulletin"), defendant herein.
- 2. Mr. Raymond Dittrich, a representative of Robert Hoe & Company (hereafter "Hoe"), would regularly and routinely visit me at the Bulletin's office in Philadelphia, Pennsylvania in an effort to sell to Bulletin Hoe products.
- 3. I participated in the negotiations with Hoe representatives for the purchase of certain machinery pursuant to a contract between Hoe and Bulletin, which contract is referred to in plaintiff's Complaint and gives rise to plaintiff's cause of action.
- 4. All negotiations, discussions, proposals, counter proposals and other actions undertaken by me in connection with the contract referred to in plaintiff's Complaint occurred either (a) by telephone calls or correspondence to and from Philadelphia between Hoe representatives and myself or (b) by meetings at the offices of the Bulletin in Philadelphia, Pennsylvania.
- 5. With respect to the meetings referred to in paragraph 4 above, I participated personally in at least 12 such meetings. All these meetings occurred in Philadelphia, Pennsylvania and were attended by Hoe representative, Raymond Dittrich.
- 6. At no time did I visit Hoe in New York or otherwise travel to New York in connection with the contract referred to in plaintiff's Complaint.

RICHARD POWERS

[Verified on June 8, 1973 by Agnes C. Sullivan]

#### Affidavit of Richard W. Carpenter

#### UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

Commonwealth of Pennsylvania & ss.:

RICHARD W. CARPENTER, being duly sworn, deposes and says:

- 1. I am Vice President—Marketing of Bulletin Company (hereafter "Bulletin"), the defendant herein. I have been active in the newspaper business for 11 years, during which time I was successively Bulletin's Retail Advertising Manager, Advertising Manager, and Advertising Director prior to my becoming Vice President—Marketing two and a half years ago. I am familiar with the daily operations and business activity of Bulletin and, through my experience at Bulletin, I have developed knowledge and an understanding of newspaper operations throughout the country.
- 2. Bulletin, a Pennsylvania corporation, publishes and sells the Evening and Sunday Bulletin, a Philadelphia daily newspaper with readers throughout the Philadelphia metropolitan area. The Bulletin's business and editorial offices as well as its printing plant are all located at 30th & Market Streets, Philadelphia, Pennsylvania.
- 3. Bulletin maintains no office in New York; it has no employees who are residents of or who are stationed in New York; it has no agent authorized to accept service of process in New York; it neither owns nor leases real or personal property in New York; it is not registered to do business in New York and it pays no New York taxes.

Bulletin is the defendant in this action brought in the Southern District of New York and was served with process in Philadelphia by a Deputy United States Marshal.

- 4. Bulletin has an average daily circulation of 615,000 and an average Sunday circulation of 690,000. Of the 615,000 papers sold daily, an average of 347 copies are sold to an independent New York distributor, Hotalings New Agency, which sells the papers primarily in Pennsylvania Station and the bus terminal to persons returning to their homes in the Philadelphia area. These sales by an independent distributor in New York constitute only .06% of Bulletin's circulation. Of the 690,000 average Sunday circulation, only about 134 copies are sold in New York by Hotalings. This is but .02% of Sunday circulation.
- 5. There are a small number of subscriptions sent to New York subscribers by mail, approximately 32 on weekdays and 31 on Sundays.
- 6. As do most newspapers serving large cities, Bulletin has a national advertising representative which promotes advertising by national concerns in the newspapers which it represents. Bulletin's national advertising representative is Million Market Newspapers (MMN) which also represents the Boston Globe, Milwaukee Journal, Milwaukee Sentinel, St. Louis Post-Dispatch, San Jose Mercury, San Jose News, and the Washington Star. In addition to an office in New York, MMN also has offices in Chicago, Detroit, Los Angeles, and San Francisco. Any advertising which might result from the activities of MMN is submitted directly to Bulletin and is accepted by Bulletin in Philadelphia. Bulletin has a telephone listing in New York, but this listing is made by MMN at its address and telephone number for advertising purposes only.

- 7. Bulletin's national advertising representative for its Sunday rotogravure magazine is Metropolitan Sunday Newspapers (MSN) which, in addition to its New York office, has offices in Chicago, Detroit, Los Angeles, and San Francisco. MSN represents 50 other Sunday newspapers in connection with the promotion of national advertising in Sunday newspaper magazines. As with advertising promoted by MMN, any advertising placed with Bulletin as a result of MSN efforts is submitted to Bulletin in Philadelphia and accepted in Philadelphia.
- 8. Because New York is a center for advertising in this country it is inevitable that Bulletin receives advertising revenue from advertisers or through advertising agencies located in New York. In every instance, however, the advertising is accepted in Philadelphia, payment is made to Philadelphia, and the advertisement is circulated in Philadelphia to Philadelphia readers to promote sales of the advertised product in Philadelphia. It is estimated that the percentage of total advertising in the Bulletin emanating from MMN and MSN constitutes approximately ten percent of Bulletin's total advertising. Of this, less than 1% is classified advertising.
- 9. In the Philadelphia area there are branch stores of department store chains headquartered in New York City such as Lord & Taylor, Klein's, Korvettes and Bonwit Teller. Frequently, advertising is placed in the Bulletin to promote sales in those Philadelphia branch stores. In connection with such advertising, Bulletin's personnel have paid calls on the New York headquarters of those stores. Bulletin personnel have also called on advertising agencies and their national advertising representatives located in New York to discuss advertising in Philadelphia in the Philadelphia Bulletin. Such visits to generate good will

and discuss advertising with advertisers and advertising agencies are made by almost every publication throughout the country which carries advertising messages.

- 10. Bulletin is also a member of four professional trade associations which have headquarters in New York and Bulletin's personnel attend the annual conventions of two of those associations which are held in New York City. Almost every major newspaper in the country belongs to such organizations.
- 11. Bulletin capital stock is owned by but one New York resident whose stock ownership constitutes less than 1% of all outstanding Bulletin stock.
- 12. There is no New York registrar or transfer agent for Bulletin Shares.
- 13. Bulletin has no financial relationship with any bank or financial institution in New York.
- 14. Bulletin owns no capital stock of any New York corporation.
- 15. No Bulletin reporter is stationed in New York, Bulletin reporters travel to New York sporadically, principally in connection with sporting events.
- 16. National and international news, including news originating in New York, is covered through subscriptions by the Bulletin to the Associated Press and UPI wire services.
- 17. Bulletin syndicates no feature material and, therefore, sells no such syndicated material in New York or elsewhere.
- 18. Bulletin sells no books in New York. Bulletin does sell an almanac, but only in Pennsylvania and New Jersey.

- 19. Bulletin does not regularly purchase supplies, equipment or furniture in New York.
  - 20. Bulletin makes no calls on New York news dealers.
- 21. I know of no other contacts of substance between Bulletin and New York other than as set forth above.

RICHARD W. CARPENTER

[Verified on June 11, 1973 by Marjorie H. Woodruff]

## Affidavit of Henry E. Bellino

#### UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

STATE OF NEW YORK COUNTY OF BRONX ss:

Henry E. Bellino, being duly sworn, hereby deposes and says:

- 1. I reside at 3190 Spencer Drive, Bronx, New York, 10465.
- 2. I am employed at R. Hoe & Co., Inc., ("Hoe") and as part of my responsibilities I am familiar with the files and records of Hoe which deal with the sales to Bulletin Company, Inc., including sales under the agreement dated February 2, 1967 (a copy of which is attached hereto as Exhibit 1).
- 3. On information and belief, the machinery referred to in paragraph 1 of the aforesaid agreement was manufactured and/or assembled at the plant of Hoe at 910 East 138th Street, New York, New York.
- 4. On information and belief, the press equipment was delivered to D. F.-Bast, Inc., at Hoe's plant in New York on or about April 18, 1968.
- 5. On information and belief, the contractor and rigger used to deliver and assemble the machinery was George R. Hall of Cleveland, Ohio
- 6. On information and belief, both George R. Hall and D. F. Bast, Inc. were acting on behalf of Bulletin Company,

## Affidavit of Henry E. Bellino

Inc. at the time the machinery was delivered to them in New York.

- 7. On information and belief, payments made under the contract were sent by mail to Hoe in New York.
- 8. On information and belief, Hoe had a long relation with Bulletin and over a period of many years had delivered large quantities of printing machinery to Bulletin Company, Inc. in contracts involving several million dollars.

HENRY E. BELLINO

[Verified on July 19, 1973 by F. Ernest Bieber]

#### AGREEMENT

The undersigned, Bulletin Company, hereinafter called "Buyer", of 30th and Market Streets, Philadelphia, County of Philadelphia, State of Pennsylvania, and R. Hoe & Co., Inc., hereinafter called "Hoe", of 910 East 138th Street, New York City, County of Bronx, State of New York, in consideration of the following covenants, agree:

1. Hoe hereby sells to Buyer, and Buyer hereby purchases from Hoe, on the following terms and conditions, the machinery described below, hereinafter referred to as "the machinery herein":

New Colormatic Newspaper Printing Press Equipment arranged substantially as shown on Hoe Diagram No. 5593-F dated December 14, 1966, a print of which marked Exhibit "A" is appended hereto as an integral part of this agreement. The said press equipment to consist of the following:

Eight (8) new Hoe Colormatic Newspaper Printing Press Units, 81" between side frames, with cylinders 141/2" diameter over plates for 223/4" long page cut-off, 90-degree stagger, including:

Underside Lock-Up with Circumferential and Lateral Registering Means for thirteen (13) Plate Cylinders and Underside Lock-Up without circumferential and lateral adjustment for six (6) plate cylinders.

Latest-design new Hoe Inking System, embodying railmounted pumps engineered for unequalled rapid color changeover and, electrical control panels at side of Units, as well as feed and return lines along the front side of bedplate;

Algrip Platforming in the aisles between Units and Folders;

Tingulok Flaps for the impression cylinders;

Warner Cylinder Brakes mounted on front side of Plate Cylinder of each printing couple;

Within-the-arch Mist Guards for each Unit;

Sealed, transparent Plexiglass Covers on drive side of Units;

Two (2) Flush Mounted Pushbutton Stations per Unit;

Mounting and attaching ten (10) Unit-Type Drive Motors in Hoe's Shop;

Necessary Platforms, Handrails and Ladders to service toprail area;

Provisions only to accommodate an Ink Suppression System, exclusive of the Ink Suppressors.

One (1) Double Former, Single Delivery 3:2 Type Anti-Friction Bearing Newspaper Folder, with the folding and cutting cylinder mechanisms located on the rear side and an extended delivery to carry products to the front (operating) side of the press, and including two (2) continuous Tabloid Slitters and overload release clutch, including:

Warner Cylinder Brake for mounting on Cutting Cylinder:

Necessary Attaching Parts to accommodate a Tetco Recorder, exclusive of the Tetco Recorder itself;

One (1) Reversible Underfolder Web Lead including Single Side Leading-in Chain Device;

One (1) Double Upper Former, equipped to accept five (5) full web leads, three (3) sets of extra nipping rollers and two (2) motorized Balloon Compensators; One (1) Electrical Variable Count Kicker;

One (1) new Latest-Design Hoe Super-Production Double Former, Single Delivery 2:1 Type Anti-Friction Bearing Newspaper Folder "Q", including:

Two (2) Tabloid Slitters;

Overload Release Clutch and Warner Cylinder Brake mounted on Folding Cylinder;

One (1) Electrical Variable Count Kicker;

Provision only to accommodate the future addition of a 3:2 Folding and Delivery Mechanism.

Top Rail Section of "open type" construction, generally comprising:

Eight (8) 6" diameter driven milled Drag Slitter Rollers, equipped with Quarter-Page Slitters, and eight (8) Motorized Straight Sheet Compensators located between Units instead of up in the top rails;

Eight (8) sets of Reversible Angle Bars, each equipped with a Motorized Compensator;

All Cut-Off Compensators will be motorized and operated by pushbotton control from central panel;

Extra-heavy, integrally-designed, cast iron Substructure, consisting of:

24" Bedplate and Ten (10) pair of Substructure Columns to provide a height of 10 ft. 0 inches from Reelroom Floor to Pressroom Floor:

Eight (8) Hoe Three-Arm Paper Roll Reels, Tensions with Semi-Automatic Swinging Arm Pasters to duplicate Reels, Tensions and Pasters, existing in Buyer's Plant, exclusive, however, of provisions for making these Fully-Automatic Pasters in the future;

Single Side Leading-in Chain Devices, to facilitate leading of Webs from the Reels to the arch of their respective Units;

One (1) pair of Columns to support area left vacant where future Unit No. 81 will occupy.

One (1) Reversible Unit mounted Colormatic Color Couple, for location on the second impression printing couple of Unit No. 77, including new Inking System, one (1) Motorized Compensator, necessary Connecting Rail and Web Lead Parts, Warner Cylinder Brakes and Compression Lock-Up on the Plate Cylinder;

Necessary drive due to the raising of the Drag Slitter Rollers one position to accommodate web leads from adjacent Color Couple;

Two (2) Colormatic Color Cylinders, for location on the second impression printing couple of Unit Nos. 75 and 80, each including New Inking System, Variable Stroke Vibrating Mechanism and Compression Lock-Up on the Plate Cylinders;

Three (3) Single Reversing Mechanisms, one (1) Double Reversing Mechanism and four (4) Manually-Operated Compensators in the Arch;

Five (5) Variable Stroke Vibrating Mechanisms, for the second impression couples of Unit Nos. 75, 77 and 80 and the first impression couple of Unit Nos. 76 and 80.

Connecting Rails and two (2) Drag Slitter Roller, each equipped with quarter-web slitter, one (1) set of Reversible Angle Bars including a Motorized Compensator, also including a Special Drive due to the Drag Rollers being raised one (1) position to accommodate the Color Couple on adjacent Units.

The purchase price of the machinery herein, based on Hoe making shipment in intact sections, is One Million One

Hundred Seventy-Seven Thousand Four Hundred Twenty and 00/100 Dollars (\$1,177,420.00) f.o.b. our plant New York, N. Y. The purchase price of the machinery herein is to be considered as firm unless Hoe is prevented from completing manufacture and shipment within the time stipulated due to such circumstances as, but not limited to, war, national emergency, insurrection or riot, acts of the public enemy or saboteurs, governmental acts, regulations or directives or by some act or delay on the part of the Buyer. In such event the Buyer and Hoe will confer and agree upon a revision of the selling price that will reasonably reflect the changes, if any, in the basic cost of producing said equipment under those altered circumstances.

Said purchase price is not f.o.b. Hoe's factory in New York City and is to be paid, in cash, in New York funds as follows:

Fifty-Eight Thousand Eight Hundred Seventy-One and 00/100 Dollars (\$58,871.00) representing Five Percentum (5%) of the purchase price herein to be paid upon acceptance of agreement, of which Hoe hereby acknowledges receipt.

One Hundred Seventeen Thousand Seven Hundred Forty-Two and 00/100 Dollars (\$117,742.00) representing Ten Percentum (10%) of the total purchase price herein to be paid on February 1, 1967.

Eight Hundred Twenty-Four Thousand One Hundred Ninety-Four and 00/100 Dollars (\$824,194.00) representing Seventy Percentum (70%) of the total purchase price to be paid in ten (10) equal successive monthly installments each in the amount of Eighty-Two Thousand Four Hundred Twenty and 00/100 Dollars (\$82,420.00) the first of which shall be due and payable on March 1, 1967 and the remainder on the first day of each of the following nine (9) months.

The balance of the purchase price to be paid when the equipment is installed and ready for commercial operation.

If manufacture of the machinery herein shall be delayed for any reason other than Buyer's request that such delay occur, then payment as hereinabove set forth may be correspondingly delayed.

- 3. Hoe hereby warrants that the machinery herein will be manufactured as specified herein and shall be free from defects in materials and workmanship when manufactured by it. This warranty shall continue for a period of (1) year from the time the machinery herein is ready for shipment and, pursuant to such warranty, Hoe agrees to repair at its expense, or furnish without charge, f.o.b. its works, a similar part to replace any part of the machinery herein which is proved as not complying with the specifications set forth herein, or to have been defective at time of shipment; but Hoe shall not be held liable for any damages or delays caused by such non-compliance or defect and Hoe shall make no allowance for repairs, replacements or alterations made by Buyer unless Hoe has given its written consent and approval thereto.
- 4. All taxes imposed by either federal, state, municipal or foreign governments, whether described as a sales, excise, license, use, gross profits, or other tax, and whether levied against the Buyer or Hoe, which shall arise out of the sale and delivery to and receipt by the Buyer, shall be added to the purchase price as set forth in section 2 hereof and paid by Buyer.
- 5. Hoe will schedule shipment of the machinery herein to commence about twelve (12) months from December 15, 1966 and Buyer agrees to accept delivery f.o.b. Hoe's plant New York at the time of said shipment; provided, however,

that shipment at or about said time shall be subject to delay in manufacture or shipment when such delay shall be due to any event or contingency beyond Hoe's control or the control of any other person with whom it may contract in connection with this contract, including, but not limited to, labor difficulties, war, national emergency, insurrection or riot, acts of the public enemy and saboteurs, inability readily to obtain materials or labor or to any governmental acts, regulations, or directives. In the event of any delay arising by reason of the foregoing conditions, the time for the performance of this agreement shall be deemed to be extended accordingly.

- 6. Buyer agrees to perform all acts necessary for the proper erection and adjusting of the machinery herein at the point of installation and bear all expenses in connection therewith from the time the machinery herein is ready for shipment f.o.b. Hoe's New York City plant. If Buyer requests, Hoe will furnish an erector as soon as possible after such request is made, generally to supervise the erection and adjusting of the machinery herein, his services to be paid for by Buyer at Hoe's then-current rates therefor. It is hereby agreed that, unless Hoe is notified to the contrary prior to the time Hoe commences shipment of the machinery, the machinery herein will be installed at the Buyer's address set forth hereinabove.
- 7. Shipping materials (such as transportation bedplates, tarpaulins, cables, turnbuckles and miscellaneous equipment) which may be used in shipping the machinery herein, and tools and equipment of Hoe's used in connection with the erection and adjustment thereof, remain the property of Hoe, and Buyer agrees to return such shipping materials to Hoe as soon as possible after receipt thereof and to return such tools and equipment to Hoe as soon as possible

after termination of their use in connection with the erection and adjustments, in every case by freight collect.

- 8. Hoe will equip the machinery herein with guards and safety appliances required by State of New York laws. If any variations therefrom are required by any applicable local laws, Hoe will equip the machinery herein in accordance therewith, provided Buyer gives Hoe specifications for such variations. In this event it is understood that Hoe will add the additional cost, if any, to the total purchase price specified in section 2 to be paid by Buyer.
- 9. Except as provided in section 3 hereof, Hoe has made no warranty or guaranty of any sort and Hoe shall be under no liability for loss or damage (direct, consequential or otherwise) under this contract, except to the extent provided in section 3 hereof.
- 10. Title to the machinery herein is hereby expressly reserved to and shall remain in Hoe until the entire purchase price, or any judgment for same, has been paid in full and all obligations of the Buyer hereunder have been fully performed.

The Buyer further agrees that in case default be made in any payment due hereunder, either of principal or interest, or in the event of any breach or default in any of the terms of this contract by the Buyer, or in case the Buyer becomes insolvent or makes an assignment for the benefit of creditors, then the whole amount covered by this contract, whether due or not, shall, at the option of Hoe, immediately become due and payable and the Buyer's right of possession cease, and Hoe shall have the right to enter the premises, with or without force or process of law and without being liable for trespass, and to take immediate possession of and remove the machinery herein and its belongings and accessories.

- 11. Buyer agrees, until Hoe has been paid in full, in cash, for the machinery herein, to maintain it in good and operative condition and to allow the agents of Hoe access to it at all reasonable times; the Buyer also agrees to pay, bear and discharge promptly all taxes that may be charged, assessed or imposed thereon or any part thereof, and rents or other charges for which it may be held, and not to remove the machinery herein from the premises in which it is initially installed, or to assign, transfer, underlet or part with the possession of same, without the consent in writing of Hoe.
- The Buyer agrees to insure the machinery herein against loss or damage by fire, 'o the full amount of the purchase price, immediately upon its arrival at destination, and to keep it so insured until all obligations undertaken by the Buyer hereunder have been fully performed, loss, if any, to be paid first to Hoe as its interest may appear; that it will promptly deliver to Hoe policies of such insurance; and that should it fail so to procure and maintain such insurance, or should it fail to deliver the policies, Hoe may insure the machinery herein at the cost of the Buyer. Risk of loss or damage to the machinery herein, from fire, flood, or from any other cause whatsoever, at any time after shipment and until such insurance is effective, shall be borne and assumed by the Buyer, it being understood and agreed that the carrier to which the machinery herein is delivered by Hoe shall be the agent of the Buyer for all purposes.
- 13. The Buyer will not permit the machinery herein or any part thereof to be so affixed to realty as to become a part thereof and will save Hoe harmless from any loss or damage which it may suffer by reason of the machinery herein or any part thereof being so regarded; and will

furnish to Hoe, at any time upon request, a waiver of landlord's or other lien upon the machinery herein.

- 14. If Hoe should so request, Buyer agrees to execute and deliver to Hoe any other instrument that Hoe may require to protect its rights and title hereunder, until the payments herein called for have all been fully paid and discharged.
- 15. If, after the machinery herein is ready for shipment from Hoe's New York City plant, there are delays in the time of erecting and adjusting the machinery herein for which Hoe is not responsible, then the balance of the purchase price as called for in section 2 hereof, shall thereupon become due and payable.
- 16. If, for any reason, Buyer shall not be prepared to receive the machinery herein when ready for shipment, then Hoe shall be deemed authorized to store the machinery herein at Buyer's risk and expense.
- 17. (a) Should Hoe be sued for patent infringement on equipment not included in this contract but which may be used by Buyer in conjunction with the machinery herein, then Buyer agrees to indemnify Hoe and save it harmless from any liability for judgements that may arise from such suits, and to bear all litigation costs in connection therewith.
- (b) Should Buyer be sued for patent infringement in connection with the machinery herein, then Hoe agrees to indemnify and save Buyer harmless from any and all liability for judgments that may arise from such suits and to bear all litigation costs in connection therewith; but it is agreed that Hoe's liability in connection with such claims for patent infringement is limited to the direct costs of litigation and any judgment that may arise therefrom.

- (c) In any such action referred to in (a) or (b) above, Hoe reserves the right to appoint counsel of its own choice and to defend or settle any such action as it may in its own judgment deem advisable.
- 18. Buyer agrees to indemnify Hoe and save it harmless from any and all liability for injury to persons (other than Hoe's own employees), or property, which may result from any cause whatsoever after the machinery herein is delivered to Buyer, f.o.b. Hoe's plant, New York City.
- 19. This contract is to be governed and interpreted by the laws of the State of New York.
- 20. This instrument contains the entire understanding between the parties hereto and no modification or waiver of any of the terms or conditions thereof shall be of any force or effect unless the same is in writing signed by both parties.

BULLETIN COMPANY

By Albert Spendlove Vice President

Attest

ROBERT L. TAYLOR President

Witness:

R. M. GARVEY

MARJORIE H. WOODRUFF

R. Hoe & Co., Inc.

By R. R. DITTRICH Vice President

Attest

ROBERT G. ROXBY Asst. Secretary

Witness:

J. WARREN

DOROTHY KINGSLEY

Dated at New York, New York: February 2, 1967

## Affidavit of Raymond R. Dittrich

#### UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF NEW YORK

#### [SAME TITLE]

STATE OF NEW YORK COUNTY OF NEW YORK SS.:

RAYMOND R. DITTRICH, being duly sworn, hereby deposes and says:

- 1. I reside at 3 Salisbury Manor, South Nyack, New York.
- 2. I was employed as Vice President of R. Hoe & Co., Inc. ("Hoe") at the time Hoe entered into an agreement with Bulletin Company, Inc. ("Bulletin") dated February 2, 1967, a copy of which is attached as exhibit one to the affidavit of Henry E. Bellino dated July 19, 1973 heretofore filed in this action (hereinafter the "agreement").
- 3. I participated in the negotiations with representatives of Bulletin for the purchase of machinery described in the agreement.
- 4. On January 6, 1967 the agreement was forwarded by Mr. Daniel J. Mangieri of the Contract Administration Division of Hoe to Bulletin, as evidenced by his letter of January 6, 1967 to Mr. Albert Spendlove of Bulletin, a copy of which is annexed hereto as Exhibit 1.
- 5. The agreement was executed on behalf of Bulletin by Mr. Spendlove, attested to by Mr. Robert L. Taylor, President of Bulletin, and returned to Mr. Mangieri on or about January 23, 1967. The contract had not yet been executed by Hoe, as is evidenced by a letter dated January 23, 1967

## Affidavit of Raymond R. Dittrich

from Mr. Spendlove to Mr. Mangieri, a copy of which is annexed hereto as Exhibit 2.

- 6. The contract was executed by me on behalf of Hoe on February 2, 1967 in New York and witnessed by Mr. Julius Warren and Miss Dorothy Kingsley and my signature was attested to by Mr. Robert G. Roxby, then Assistant Secretary of Hoe, on that date.
- 7. On February 2, 1967 Mr. Mangieri mailed a copy of the duplicate original agreement which had been executed by me in New York to the Bulletin, as is evidenced by a letter dated February 2, 1967 from Mr. Mangieri to Mr. Spendlove, a copy of which is annexed hereto as Exhibit 3.

RAYMOND R. DITTRICH

[Verified on December 4, 1973 by Theodore Mark Weitz]

## Exhibit 1 to Affidavit of Raymond R. Dittrich

cc:

Dittrich

Crowe

Roxby

Reading

File

Follow up

January 6, 1967

Mr. Albert Spendlove Vice President & Business Mgr. Bulletin Company 30th and Market Sts. Philadelphia, Pa.

Re: Our Order No. 19300

Dear Mr. Spendlove:

In connection with your recent purchase of a new Hoe 8-Unit Colormatic Press, enclosed please find two copies of our Formal Agreement which we would appreciate your having the properly authorized officers sign, and have both copies returned to us. We, in turn, will have the officers of our Company countersign them and will return the duplicate original to you for your reference and file.

If you have any questions regarding the above, please do not hesitate to let us know.

Very truly yours,

R. Hoe & Co., Inc.
Daniel J. Mangieri
Contract Administration Division

DJM/ec Enc.

#### Exhibit 2 to Affidavit of Raymond R. Dittrich

#### THE EVENING AND SUNDAY BULLETIN

30th and Market Streets Philadelphia, Pa. 19101

January 23, 1967

Mr. Daniel J. Mangieri Contract Administration Division R. Hoe & Co. Inc., 910 E. 138th Street Bronx, N. Y. 10454

#### Dear Mr. Mangieri:

We have reviewed and signed and I return enclosed both copies of the formal agreement which you sent to me with your letter of January 6, 1967. This agreement relates to our purchase of a new Hoe 8 unit colormatic press as described in the formal agreement and which you have identified with your order no. 19300. Also enclosed is Bulletin Purchase Order No. 61995 relating to the same purchase and agreement. All future correspondence and invoices should bear this Bulletin Purchase Order number along with your order number if you desire the latter.

In signing the agreement we have made, and I have initialed, one change. In Paragraph No. 5, on page 3, I have crossed out the word "about". This is necessary to make the formal agreement consistent on this point with my discussions with Mr. Raymond Dittrich, Vice President of your Company, and with the proposal which I signed with Mr. Dittrich on December 15, 1966 following such discussion on that date.

I call your attention to one other point with regard to the manner in which we have signed the formal agreement. The form as you prepared it called for the agreement to

## Exhibit 2 to Affidavit of Raymond R. Dittrich

be signed by the President or a Vice-President of Bulletin Company, with such signature to be attested to by the Secretary of the Company. Since the Secretary of the Company is out of the city I have signed the agreement as Vice-President of Bulletin Company and my signature has been attested to by Mr. Robert L. Taylor, President of Bulletin Company. I am confident that these signatures will be acceptable to your company.

I shall anticipate receiving one of the two enclosed copies for our reference and file after they have been duly countersigned by the officers of your Company.

> Albert Spendlove, Vice President and Business Manager

AS/rmg.

cc: Mr. Raymond Dittrich Mr. Richard Powers

# LETTERHEAD OF BULLETIN COMPANY

R. Hoe & Co. 910 E. 138th St., Bronx, N. Y. 10404

Purchase Order #61995

Confirming verbal order given and accepted December 15, 1966.

New Hoe Colormatic Newspaper Printing Press equipment as described in detail in the agreement sent to Mr. Albert Spendlove of Bulletin Company by Mr. Daniel J.

# Exhibit 2 to Affidavit of Raymond R. Dittrich

Mangieri of R. Hoe & Co. Inc. with latter's letter of Jan. 6, 1967. Said agreement is further identified in that it was signed by Mr. Spendlove and countersigned by Mr. Robert L. Taylor, president of Bulletin Company and returned to Mr. Mangieri with letter dated Jan. 23, 1967. Total price \$1,177,420.00 FOB Hoe Factory in New York, N. Y. and delivery and other terms and conditions to be per the agreement referred to.

BULLETIN COMPANY

Purchasing Department

#### Exhibit 3 of Raymond R. Dittrich

cc: Dittrich Crowe Reading File

February 2, 1967

Mr. Albert Spendlove Vice President and Business Mgr. BULLETIN COMPANY 30th and Market Street Philadelphia, Pa.

Re: Our Order #19300

Dear Mr. Spendlove:

In connection with the above captioned order enclosed please find copy of the duplicate original agreement which has been countersigned by the Officers of our Company and which is for your reference and files.

As mentioned in your letter of January 23, 1967 in which you have crossed out the word "about" in Paragraph #5 on Page 3, our Vice President, Mr. Dittrich, has initialed that change.

If you have any questions or are in need of any further assistance, please let us know.

Very truly yours,

R. Hoe & Co., INC.

DANIEL J. MANGIERI Contract Administration Division

DJM/ec Enc.

# Supplemental Affidavit of Albert Spendlove

# UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

COMMONWEALTH OF PENNSYLVANIA SS.:

Albert Spendlove, being duly sworn, deposes and says:

- 1. I am Vice-President and Business Manager of Bulletin Company, Inc. (hereinafter "Bulletin"), defendant herein.
- In my Affidavit previously submitted to the Court in connection with this matter, I stated, inter alia, that negotiations, discussions and proposals which led up to the execution of the contract referred to in plaintiff's Complaint occurred as a result of meetings between representatives of R. Hoe & Co. (hereinafter "Hoe") and Bulletin representatives at Bulletin's offices in Philadelphia (paragraph 4); that the machinery purchased by Bulletin from Hoe was delivered in parts by an independent contractor to Bulletin in Philadelphia, Pa. and assembled in Philadelphia (paragraphs 8 and 9); that the assembling of the machinery parts was supervised by a Hoe representative in Philadelphia (paragraph 10); that after delivery repairs were made to said machinery in Philadelphia by Hoe representatives (paragraph 12); and that at no time did any Bulletin representative visit New York in connection with the contract referred to in plaintiff's Complaint.
- 3. I further stated that on December 15, 1966 I signed in Philadelphia a document entitled "Proposal", which is attached hereto as Exhibit 1 (paragraph 5), and that I

# Supplemental Affidavit of Albert Spendlove

signed in Philadelphia on or about February 2, 1967 the contract referred to in plaintiff's Complaint (paragraph 6).

- 4. At the time I signed the Proposal attached hereto as Exhibit 1, Mr. Dittrich had already signed the Proposal.
- 5. The Proposal attached hereto as Exhibit 1 contained all the essential terms of Bulletin's agreement to purchase the subject machinery from Hoe.
- 6. At the time I signed the Proposal on December 15, 1973 I was aware of most, if not all, of the provisions later incorporated in the formal document which is the contract referred to in plaintiff's Complaint.
- 7. On or about December 22, 1973, in accordance with the terms of the Proposal which I signed in Philadelphia on December 15, 1973, Bulletin paid Hoe \$58,871, which was 5% of the purchase price. A copy of my letter transmitting a check for said amount is attached hereto as Exhibit 2.
- 8. By letter dated January 6, 1967, Mr. Richard Powers, under my supervision, confirmed certain details relating to the Proposal and referred to the fact that only minor details needed to be reviewed. (A copy of this letter is attached hereto as Exhibit 3).
- 9. The contract referred to in plaintiff's Complaint dated February 2, 1967 merely confirmed and memorialized what was already agreed upon by Hoe and Bulletin.

ALBERT SPENDLOVE

[Verified on December 20, 1973 by Marjorie H. Wood-ruff]

LETTERHEAD OF R. HOE & Co., INC.

BULLETIN COMPANY
30th and Market Streets
Philadelphia, Pennsylvania 19104

Attention: Mr. Albert Spendlove, Vice President & Business Manager

#### Gentlemen:

Pursuant to our recent discussion we respectfully offer for your consideration this Proposal covering a new Hoe 8-Unit COLORMATIC Press, arranged substantially as shown in the appended Layout Drawing No. 5593-F, dated December 14, 1966.

Our prices for the equipment, predicated on shipping the Units and Folders in factory-assembled sections, and including provisions only for arranging the Units and Folders for Unit-Type Motor Drives, are as follows:

Eight (8) new Hoe COLORMATIC Newspaper Printing Press Units, 81" between side frames, with cylinders 14½" diameter over plates for 22¾" long page cut-off, 90-degree stagger, [Compression Type Lock-Up on all Plate Cylinders,] including:

Latest-design new Hoe Inking System, embodying railmounted pumps engineered for unequalled rapid color changeover and, electrical control panels at side of Units, as well as feed and return lines along the front side of bedplate;

Algrip Platforming in the aisles between Units and Folders;

Tingulok Flaps for the impression cylinders;

Warner Cylinder Brakes mounted on front side of Plate Cylinder of each printing couple;

Within-the-arch Mist Guards for each Unit;

Sealed, transparent Plexiglass Covers on drive side of Units;

Two (2) Flush Mounted Pushbutton Stations per Unit; Mounting and attaching nine (9) Unit-Type Drive Motors in our Shop;

Necessary Platforms, Handrails and Ladders to service toprail area;

Provisions only to accommodate an Ink Suppression System, exclusive of the Ink Suppressors.

One (1) Double Former, Single Delivery 3:2 Type Anti-Friction Bearing Newspaper Folder, with the folding and cutting cylinder mechanisms located on the rear side and an extended delivery to carry products to the front (operating) side of the press, and including two (2) continuous Tabloid Slitters and overload release clutch, including:

Warner Cylinder Brake for mounting on Cutting Cylinder;

Necessary Attaching Parts to accommodate a Tetco Recorder, exclusive of the Tetco Recorder itself;

One (1) Reversible Underfolder Web Lead including Single Side Leading-in Chain Device;

One (1) Double Upper Former, equipped to accept five (5) full web leads, three (3) sets of extra nipping rollers and two (2) motorized Balloon Compensators;

One (1) Electrical Variable Count Kicker;

Top-Rail Section of "open type" construction, generally comprising:

Eight (8) 6" diameter driven milled Drag Slitter Rollers, equipped with Quarter-Page Slitters, and eight (8) Motorized Straight Sheet Compensators located between Units instead of up in the top rails;

Eight (8) sets of Reversible Angle Bars, each equipped with a Motorized Compensator;

All Cut-Off Compensators will be motorized and operated by push-button control from central panel;

Extra-heavy, integrally-designed, cast iron Substructure, consisting of:

24" Bedplate and nine (9) pair of Substructure Columns to provide a height of 10 ft. 0 inches from Reelroom Floor to Pressroom Floor;

Eight (8) Hoe Three-Arm Paper Roll Reels, Tensions with Semi-Automatic Swinging Arm Pasters to duplicate Reels, Tensions and Pasters, existing in your plant, exclusive, however, of provisions for making these Fully-Automatic Pasters in the future;

Single Side Leading-in Chain Devices, to facilitate leading of Webs from the Reels to the arch of their respective Units;

One (1) pair of Columns to support area left vacant where future Unit No. 81 will occupy.

#### COLOR FACILITIES

One (1) Reversible Unit Mounted Colormatic Color Couple, for location on the second impression printing couple of Unit No. 77, including new Inking System, one (1) Motorized Compensator, necessary Connecting Rail and Web Lead Parts, Warner Cylinder Brakes and Compression Lock-Up on the Plate Cylinder;

Necessary drive due to the raising of the Drag Slitter Rollers one position to accommodate web leads from adjacent Color Couple;

Two (2) Colormatic Color Cylinders, for location on the second impression printing couple of Unit Nos. 75 and 80, each including New Inking System, Variable

Stroke Vibrating Mechanism and Compression Lock-Up on the Plate Cylinders;

Three (3) Single Reversing Mechanisms, one (1) Double Reversing Mechanism and four (4) Manually-Operated Compensators in the Arch;

Five (5) Variable Stroke Vibrating Mechanisms, for the second impression couples of Unit Nos. 75, 77 and 80 and the first impression couple of Unit Nos. 76 and 80.

OPTIONAL EQUIPMENT

Option #1

Extra for Underside Lock-Up with Circumferential and Lateral Registering Means for thirteen (13) Plate Cylinders and Underside Lock-Up without circumferential and lateral adjustment for six (6) plate cylinders.

PLUS .......\$47,430.00

Option #2

One (1) new Latest-Design Hoe Super-Production Double Former, Single Delivery 2:1 Type Anti-Friction Bearing Newspaper Folder "Q", with two (2) Tabloid Slitters, Overload Release Clutch and Warner Cylinder Brake mounted on folding cylinder, as well as provisions only to accommodate the future addition of a 3:2 folding and delivery mechanism;

24" Bedplate and one (1) pair of 10' 0" Substructure Columns;

Provisions only for arranging the Folder for Unit-Type Motor Drive, exclusive, however, of the Motor itself;

Mount and attach one (1) Unit-Type Drive Motor in our shop.

PLUS ...... \$71,800.00

#### Option #3

Connecting Rails and one (1) Drag Slitter Roller, equipped with Quarter-Web Slitter, one (1) set of Reversible Angle Bars including a Motorized Compensator, as well as a Special Drive due to the Drag Roller being raised one (1) position to accommodate the Color Couple on adjacent units;

PLUS ...... \$15,700.00

#### Option #4

Same equipment as outlined under Option #3, but, for two Drag Slitter Roller positions, etc.

PLUS ...... \$22,750.00

#### Option #5

Same equipment as outlined under Option #3, but, for three (3) Drag Slitter Roller positions, etc.

PLUS ...... \$29,800.00

Prices quoted herein are net f.o.b. our plant at New York, New York and are firm provided:

- 1) We have the pleasure of receiving your order on or before December 15, 1966;
- 2) And, if favored with your order, unless we are prevented from completing manufacture and shipment within the time stipulated due to circumstances such as, but not limited to, war, national emergency, insurrection or riot, acts of the public enemy or saboteurs, governmental acts, regulations or directives, or by some act or delay on your part. In such event, the parties in the Agreement will confer and agree upon a revision of the above selling prices that will reasonably reflect the changes, if any, in the basic costs of producing the equipment under those altered circumstances.

Based on our current workload, shipment of the Press Equipment quoted herein can begin in approximately twelve (12) months from receipt of your order, subject to delays due to causes beyond our control.

May we suggest terms of payment, in New York funds, as follows:

5% of the total purchase price stipulated herein to be paid, in cash, upon your acceptance of this Proposal;

10% of the total purchase price stipulated herein to be paid, in cash, at or before the commencement of engineering work;

70% of the total purchase price stipulated herein to be paid, in cash, in equal successive monthly installments during the period between the commencement of manufacturing and the estimated time of shipment;

The balance of the purchase price to be paid, in cash, when the equipment is installed and ready for commercial operation.

It is understood that all sales, excise or other taxes relating or pertaining to the sale or delivery of the equipment herein, whether imposed upon the Seller or Purchaser, or otherwise resulting from the contract herein, shall be added to the purchase price.

Upon your acceptance of this Proposal, we will prepare and submit to you the usual formal agreement.

Very truly yours,

R. HOE & Co., INC.

R. R. DITTRICH
Vice-President—Press Sales

RRD:EKA

CC: Mr. RICHARD POWERS

Mechanical Assistant

Production Manager

December 22, 1966

Mr. R. R. Dittrich Vice President—Press Sales R. Hoe & Co. Inc. 910 E. 138th Street Bronx, N. Y. 10454

Dear Mr. Dittrich:

Under the terms of the new press proposal which you and I have signed as of December 15th, 1966, 5% of the total purchase price is immediately due and payable. Accordingly I enclose Bulletin Company check in the amount of \$58,871.

Sincerely,

Albert Spendlove
Vice President and Business Manager

AS/rmg.

cc: Mr. Raymond D. McGee.

THE EVENING AND SUNDAY BULLETIN 30th and Market Streets, Philadelphia, Pa. 19101

January 6, 1967

Mr. Raymond R. Dittrich Vice President—Press Sales R. Hoe & Company, Inc. 910 East 138th Street Bronx, New York 10454

Dear Ray:

With reference to your Proposal on new press equipment dated December 14th, 1966, as amended to reduce the num-

ber of units to eight, you have indicated that you wish a confirmation of our decision to elect to use the Underside Lock-Up feature.

Since we have made a definite decision to use Underside Lock-Up, this letter will serve as your authority to proceed on this basis which is Option number 1 on your Proposal.

We have similarly elected to proceed on Options number 2, and number 4 as indicated by the initialed entries on your signed copy of the Proposal.

It is my understanding that the price for Skip-Slitters has been eliminated and that the Variable Count Electric Kicker is to be included with the 2:1 Folder as well as with the 3:2 Folder.

At your convenience, we would like to have a meeting at The Bulletin in order to review all of the minor details such as; compensators, columns, etc.

# Sincerely yours,

THE EVENING BULLETIN

RICHARD POWERS

Mechanical Assistant

Production Manager

RP:w

cc: Mr. Wm. McLean, III Mr. A. Spendleve Mr. J. P. Grant

#### UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

Filed U. S. District Court Feb 26 6:12 PM '74 S. D. of N. Y.

[SAME TITLE]

#### APPEARANCES:

WINTHROP, STIMSON, PUTNAM & ROBERTS By: A. Edward Grashof, Esq. 40 Wall Street New York, New York 10005

Attorneys for the Plaintiff

BLEAKLEY, PLATT, SCHMIDT & FRITZ By: Frank A. Fritz, Esq. 120 Broadway New York, New York 10005

Attorneys for the Defendant.

LAWRENCE W. PIERCE, D.J.

Plaintiff and defendant contracted for the plaintiff to sell defendant certain printing machinery. Plaintiff's plant was located in New York City and the defendant's in Philadelphia, Pennsylvania. The contract negotiations took place in Philadelphia and also via telephonic and mail communications between the two cities. The defendant signed the contract in Philadelphia and the plaintiff signed it in New York.

According to the contract the machinery was to be delivered f.o.b. plaintiff's New York plant. The defendant

forwarded the contract payments by mail from Philadelphia. The contract provided that it was to be governed and interpreted by New York law.

The defendant employed an independent contractor to transport the machinery from New York to Philadelphia; plaintiff's employee supervised the installation and erection of the machinery in Philadelphia. The machinery allegedly failed to operate and the defendant declined to make further payments. The plaintiff has brought this action to recover the balance allegedly due under the contract. Service of process was made upon the defendant in Philadelphia by a United States deputy marshal pursuant to Rule 4(e) of the Fed.R.Civ.P. The defendant has moved to dismiss the complaint pursuant to Rule 12(b)(2) on the ground that the Court lacks in personam jurisdiction.

The plaintiff contends that the defendant is subject to the jurisdiction of this Court pursuant to NYCPLR §302(a)(1) as applied through Rule 4(e).

Section 302(a)(1) of the CPLR states: "As to a cause of action arising from any of the acts enumerated in this section, a court may exercise personal jurisdiction over any non-domiciliary... who in person or through an agent: 1. transacts any business within the state." This section aims to make amenable to suit in New York those non-resident defendants who have engaged in some purposeful activity within the state in connection with the matter in suit. Longines-Wittnauer Watch Co. v. Barnes & Reinecke, Inc., 261 N.Y.S. 2d 8, 18 (Ct. App.), cert. denied, 382 U.S. 905 (1965). After a careful assessment of the facts presented herein, the Court has concluded that the defendant has not

<sup>&</sup>lt;sup>1</sup> There is no contention that the defendant is doing business in New York and hence amenable to suit in New York under the provisions of CPLR § 301.

engaged in such purposeful activity and therefore has not transacted business in New York within the meaning of 302(a)(1). We note that the defendant is a Pennsylvania corporation; it has no property in New York; is not licensed to do business in New York; has no offices or employees in New York and circulates less than 1% of its daily and Sunday circulation in New York.

M. Katz & Son Billiard Products, Inc. v. G. Correale & Sons, Inc., 270 N.Y.S. 2d 672 (1st Dep't 1966), aff'd, 285 N.Y.S. 2d 871 (1967) presented a situation similar to the one in this case. There "[p]laintiff alleged that it and defendant had engaged in business transactions with each other for 30 years, and that . . . in accordance with their practice, defendant's president had placed an order for . . . billiard cues and triangles, and that plaintiff shipped the order to the defendant's place of business in New Jersey by common carrier f.o.b. plaintiff's factory in New York City." 285 N.Y.S. 2d at 871. The Appellate Division unanimously held that these contracts did not constitute sufficient purposeful acts to sustain jurisdiction 270 N.Y.S. 2d at 673 and this holding was unanimously affirmed by the New York Court of Appeals. See The Total Sound, Inc. v. Universal Record Distributing Corp., 286 F.Supp. 123 (S.D.N.Y. 1968).

The plaintiff herein contends that since (1) the contract was executed in New York<sup>2</sup> and it provided that it was to be governed and interpreted by New York law and (2) the merchandise was shipped f.o.b. New York, therefore, these contracts should be sufficient for a finding of a jurisdictional basis. However, the Court fails to see how any of these factors constitute purposeful activity by the defendance.

<sup>&</sup>lt;sup>2</sup> Where the contract was executed is in dispute. However, for purposes of this motion, the Court will assume that it was executed in New York.

dant which would make it amenable to 302(a)(1) jurisdiction.

Where the contract was signed or executed is not determinative. Green & White Construction Co. v. Columbus Asphalt Corp., 293 F.Supp. 279 (S.D.N.Y. 1968). specially is this so where as here the defendant never entered New York to either negotiate or sign the agreement. Nor is it decisive that the parties agreed that the contract was to be governed and interpreted in accordance with New York law. This choice of law provision cannot he construed as a voluntary submission by the defendant to the personal jurisdiction of the New York courts. Agrashell, Inc. v. Bernard Sirotta Co., 344 F.2d 583, 588 (2d Cir. 1965). Finally, the fact that the shipment was made f.o.b. New York is of little consequence since it was the seller plaintiff, a New York domiciliary, who chose the f.o.b. point. It cannot be said that it thereby subjected the defendant to New York jurisdiction. Compare M. Katz & Sons Billiard Products, Inc. supra with Agrashell, Inc. supra.

The defendant's motion to dismiss the complaint for lack of in personam jurisdiction is hereby granted.

# SO ORDERED

Dated: New York, New York February 26, 1974

L. W. PIERCE

U. S. D. J.

#### **Judgment**

# UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

[Same Title]

Defendant having moved the Court to dismiss the complaint pursuant to Rule 12(b)(2) of the Federal Rules of Civil Procedure, on the ground that the Court lacks in personam jurisdiction, and the said motion having come on to be heard before the Honorable Lawrence W. Pierce, United States District Judge, and the Court thereafter on February 26, 1974, having handed down its memorandum opinion granting the said motion, it is,

Ordered, Adjudged and Decreed, that defendant, Bulletin Company, Inc., have judgment against the plaintiff, John J. Galgay, As Trustee in the Reorganization of R. Hoe & Co., Inc., dismissing the complaint.

Dated: New York, New York March 1, 1974

RAYMOND F. BURGHARDT

Clerk

Copies Les 11 197 BLEAKLEY, PLATT, SCHMIN